On my part, I would hold that the Town Board Byelaws are still valid and subsisting and therefore s 1(1) of the Byelaws are still enforceable against the respondent. I shall therefore set aside the magistrate's order of acquittal and remit the case back to her court for the respondent to be tried in accordance with the same provisions as originally charged.

Appeal allowed.

Solicitors: *Azman Davidson & Co.*

Reported by *Kevin Mathews*

Tang Eng Iron Works Co Ltd v Ting Ling Kiew & Anor

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 144 OF 1989
HAIDAR J
3 JANUARY 1990

Companies and Corporations — Fraud on creditors — Application by creditor under s 304 of the Companies Act 1965 for declaration — Whether business of the company carried on with intent to defraud creditor — Whether directors personally responsible for the debts and liabilities of the company — Whether directors' actions amounted to fraud — Companies Act 1965, s 304

Civil Procedure — Commencement of action — Fraud — Application under s 304 of the Companies Act 1965 — Company not yet wound up — Whether action correctly commenced by originating summons — Rules of the High Court 1980, O 88 r 2

The plaintiffs had commenced an action against the defendants by way of originating summons under O 7 and O 88 r 2 of the Rules of the High Court 1980 and under s 304 of the Companies Act 1965. The defendants were appealing against the court's earlier decision granting the summons in favour of the plaintiffs. The defendants were directors of a company incorporated in Malaysia ('HLE'). The plaintiffs entered into two building contracts with HLE for construction works in a property to be known as Jade Tower ('the property'). The plaintiffs duly executed the works on the property, but HLE failed to pay the plaintiffs. An arbitration award was made in the plaintiffs' favour, and the said award was subsequently incorporated in a judgment dated 19 July 1988. The plaintiffs obtained an order for examination of the defendants as responsible officers of HLE in order to seek payment. The facts unearthed by the examination prompted the plaintiffs to bring the action commenced by the originating summons.

The plaintiffs relied on various grounds to show that the defendants intended to defraud the plaintiffs as creditors:

(i) An agreement dated 5 April 1984 showed that the first defendant attempted to pay the vendor for his share in HLE by disposing of HLE's assets.

(ii) In a memorandum of charge in favour of Public Finance Bhd ('PFB'), HLE had charged the property to PFB in consideration of moneys loaned for the express purpose for payment of construction work on the property. The defendants admitted that the loan moneys had been used to apply for a timber concession through a bumiputra third party instead.

(iii) The accounts for HLE showed that loans had been made by HLE to the directors, which loans had been subsequently merged into the sundry debtor's account. In addition, the moneys advanced to the bumiputra third party for the timber concession was not reflected in the accounts.

(iv) The property (which was the main asset of HLE) was transferred to a company for $3m five days after the arbitration award was made in favour of the plaintiffs at an undervalue.

Held, dismissing the defendants' appeal:

(1) Section 304(1) of the Companies Act 1965 would apply even prior to the winding up of a company. As HLE was not wound up yet, the action was correctly commenced by originating summons and not by writ under O 88 r 2.

(2) The onus was on the plaintiffs to show that the defendants had been guilty of dishonest fraud. Based on grounds (ii) to (iv) above, the plaintiffs had succeeded in showing that the defendants had intended to defraud the plaintiffs.

(a) The use of the loan moneys for a purpose other than what they were meant for constituted dishonest fraud.

(b) The loans to the directors were in breach of s 133 of the Companies Act 1965, and the defendants had tried to pull wool over the eyes of the plaintiffs by that fact in the accounts.

(c) The speed of disposal and registration of the property and the direct payment to PFB in settlement of HLE's debt showed a scheme to defraud the plaintiffs.

(3) The agreement dated 5 April 1984 was not sufficient to constitute dishonest fraud even though it might have been a breach of s 67 of the Companies Act 1965 (relating to giving of financial assistance for the purchase of assets).

Cases referred to

1 *Re Patrick & Lyon Ltd* [1933] All ER 590 (folld)
2 *Re Peace Insurance Co Ltd* [1964] MLJ 232 (refd)
3 *Lloyds Bank Ltd* v *Marcan & Ors* [1973] 3 All ER 754 (refd)
4 *Re Mahel Investments Pty Ltd and the Companies Act* (1979) 4 ACLR 35 (refd)

Legislation referred to

Companies Act 1965 ss 67, 133, 304
Evidence Act 1950 s 33
Rules of the High Court 1980 O 5 r 2(6), O 7, O 41 r 11, O 88 r 2

CJ Eng (Ms) (*KJ Foo (Ms)* with her) for the plaintiffs.
KY Lin (*Tony Bong* with him) for the defendants.

Cur Adv Vult

Haidar J: The plaintiffs, Tang Eng Iron Works Co Ltd, filed this originating summons (encl 2) under O 7 and O 88 r 2 of the Rules of the High Court 1980 and s 304 of the Companies Act 1965, for the following reliefs:

(1) A declaration that the business of Har Lee Enterprise Sdn Bhd has been carried on with intent to defraud creditors of the defendants.

(2) A declaration that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe shall be personally responsible, without any limitation of liability, for all of the debts or other liabilities of the said Har Lee Enterprise Sdn Bhd.

(3) An order that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe do repay to the plaintiffs the sum comprised in the arbitration award dated 20 May 1988, viz the sum of Malaysian ringgit four million one hundred and sixty-five thousand one hundred and forty-five and cents eighty ($4,165,145.80) only together with interest thereon at the rate of 8% per annum from the date of the said arbitration award until the date of full and final settlement; costs of the plaintiffs and of the said arbitration; costs of the arbitration award taxed at $25,245.45; costs of the plaintiffs in Originating Summons No KG 156 of 1988 and judgment therein.

(4) An order that the said (1) Ting Ling Kiew and (2) Ting Ling Hoe do pay the costs of and incidental to this application.

An affidavit in support was filed by one Rex Chan Jui Yuen, the regional manager of the plaintiffs' company. An affidavit in opposition was filed by the first defendant on his own behalf and on behalf of the second defendant (encl 10).

This is an appeal by the defendants against my order granting in terms of the summons in favour of the plaintiffs. The following preliminary facts, I think, were not disputed:

(1) Har Lee Enterprise Sdn Bhd ('HLE') was incorporated in Malaysia under the Companies Act 1965 on 9 December 1980 and presently has a registered office at lot 219, section 61, First Floor, Ban Hock Road, Kuching.

(2) The first defendant, Ting Ling Kiew is and has been at all material times since 4 June 1984, the managing director of HLE.

(3) The second defendant, Ting Ling Hoe, is and has been at all material times since 4 June 1984, a director and the secretary of the board of directors of HLE.

(4) The plaintiffs entered into two building contracts with HLE on 19 June 1984 for the construction and completion of foundation and basement works to HLE's proposed development project known as Jade Tower Commercial Complex on the then property of HLE at lot 276, section 48 Kuching Town land district ('the property').

(5) Pursuant to the said building contracts, the plaintiffs duly executed works on the property. In default of payment by HLE and pursuant to the arbitration clause in the building contracts, the plaintiffs submitted their claim against HLE to arbitration.

(6) On 20 May 1988, the arbitrator published his award which went in favour of the plaintiffs. (See exh RC-1(B).) Under the said award, HLE was to pay to the plaintiffs within 14 days from the date of the award was taken up by either party, a sum of $4,165,145.90 as well as the costs of the plaintiffs, and costs of the arbitration which are yet to be taxed, and further to reimburse the plaintiffs $25,245.45 being taxed and settled costs of the award.

(7) The said award was subsequently incorporated in a judgment dated 19 July 1988 by the High Court vide Originating Summons No KG 156 of 1988 (see exh RC-2(B)).

(8) The plaintiffs were never paid for their work. The plaintiffs obtained an order for the examination of the defendants as responsible officers of HLE in order to seek payment. The facts unearthed by the examination prompted the plaintiffs to bring the present originating summons.

The present summons is under s 304(1) of the Companies Act 1965 which reads:

> *If* in the course of the winding up of as company or *in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company* or creditors of any other person *or for any fraudulent purpose, the Court on the application of* the liquidator or *any creditor* or contributory of the company *may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.* (Emphasis added.)

At the outset of the hearing of this summons, Mr Lin, counsel for the defendants applied to the court to expunge the arbitration award proceedings (RC-1(A) and RC-1(B)) enclosed in the summons under s 33 of the Evidence Act 1950 and relying on Rafiah Salim *Evidence in Malaysia and Singapore* at pp 189-190 and 264-266. With respect, Mr Lin seemed to have a misconception regarding the award of the arbitrator as clearly it is equivalent to a judgment of a court and in any event under O 41 r 11 of the Rules of the High Court 1980 the award can be attached to the affidavit. In the result the application was refused by me.

Next, Mr Lin submitted that s 304(1) of the Companies Act 1965 is only applicable when the company has been wound up as referred to in para 3(b) and (c) of the first defendants' affidavit. With respect, the submission was without any merits whatsoever and I agreed with what Miss CJ Eng said in reply.

Mr Lin further submitted that in an action alleging fraud, the action must commence by writ and cited O 5 r 2(6) by way of comparison to O 88 r 2(1) of the Rules of the High Court 1980. As HLE is not wound up yet, I questioned Mr Lin on the correctness of his submission as clearly this application by way of originating sums was under O 88 r 2(1). In that event, Mr Lin did not

seriously pursue this issue or procedure and left it to the court. In this respect, *Companies Act of Singapore: An Annotation* by Walter Woon in dealing with an application of this nature under s 340 of the Companies Act (Cap 50, 1988 Ed) [Sing] (which is equivalent to s 304 of our Companies Act 1965) said at p 625:

> Where the company is not being wound up an application under this section should be made by originating summons: Rules of the Supreme Court 1970, O 88 r 2(1).

In the circumstances Mr Lin's submission on the procedure has no merits and I dismissed it.

Mr Lin abandoned para 3(a) of the first defendant's affidavit regarding the non-completion of the examination of the defendants in view of the submission of Miss CJ Eng on the said paragraph.

In my view, it was not disputed that in the application of this nature the onus is on the plaintiff to show that the defendants have been guilty of a dishonest fraud. Maugham J in *Re Patrick and Lyon Ltd*[1] at p 593 said:

> Coming to the present case, I think that in exercising jurisdiction under s 275 the court, however little it may approve of the conduct of the director who is being attacked, is bound to consider whether he has been guilty of a dishonest fraud, and it is hardly necessary for me to point out that the onus is upon the person who seeks to make good the charge, whether he be the official receiver, or the liquidator, or a creditor, or a contributory.

It is then pertinent for me to consider whether the grounds relied on by the plaintiffs constituted intent to defraud the plaintiffs as creditor on the parts of the defendants in this case.

(1) *The agreement dated 5 April 1984*

This agreement heralded in the advent of the defendants into HLE (see exh RC-13). It will be seen that this agreement was stated to be entered into by the first defendant and one Yeh Hsin Tsan 'for themselves and as trustees for HLE'. It was submitted by the plaintiffs that even before the first defendant officially stepped into HLE, he was already taking HLE's property as his own. By para 2(e) of RC-13 he attempted to pay for his own shares by disposing of HLE's assets to the vendors and that the first defendant should know that he could not traffic with HLE's assets as if they were his personal belongings. In the event the disposing of HLE's assets in this manner, according to the plaintiffs' counsel, amounted to reducing HLE's assets and diminishing HLE's ability to meet its just debts. Such an action would constitute HLE dealing with its own shares thereby breaching s 67 of the Companies Act 1965. It was submitted that in entering into such an agreement the first defendant was evincing his intent right from the start to carry on business of HLE to defraud the creditor/s of HLE or for fraudulent purposes.

True that the action of the first defendant herein would appear to be not in order and there may even be a breach of s 67 of the Companies Act 1965 but on the facts as I perceived them I was of the view that such action or conduct at that point of time could not constitute a dishonest fraud on HLE's creditors as such and in that event the plaintiffs failed on this ground.

(2) *Memorandum of charge in favour of Public Finance Bhd*

By way of memorandum of charge instrument No L 627/85 dated 20 December 1984, HLE charged the property to Public Finance Bhd for $4,000,000 (see exh RC-6). A sum of $1,200,000 was used to discharge a prior charge in favour of Bank Utama Bhd. The purpose of the loan was stated to be for 'financing the construction of a 20-storey commercial/office/apartment complex in Kuching, Sarawak to be known as Jade Tower'. The First Schedule to the said memorandum of charge stipulated the conditions upon which the said loan was to be released and para 2 thereof reads:

> The balance of the loan amount to be released progressively against construction work done up to 90% as certified by a qualified architect or consultant engineering acceptable to the chargee.

Further, both defendants by their letter (exh RC-7) on behalf of HLE confirmed that the sum of $1.5m was to be released against the first architect's certificate of work done to the value of not less than $2.38m.

It would seem clear therefore that when the sum of $1.5m was released to HLE, it was for the express purpose of financing the Jade Tower project and clearly it should be properly paid to the plaintiffs, as the main contractors, for the work they had done on the project. The fact that the relevant certificates for work done were issued was not disputed either. Instead of effecting the payment of $1.5m to the plaintiffs as per the terms of the memorandum of charge, the first defendant admitted that the sum of $1.5m was used to apply for a timber concession through a Bumiputra third party, one TR Garak ak Mud (see exhs RC-8 and RC-9). According to the defendants (see paras 18 and 19 of encl 10), it was perfectly right for HLE to be a contractor of a timber licence held by a Bumiputra and to go to other lines of business such as timber extraction and such action was within HLE's memorandum and articles of association. First, no memorandum and articles of association of HLE were produced to support such a contention and further no agreement between HLE and TR Garak ak Mud was exhibited to show how the interests of HLE are protected, leaving the nagging question of whether such a person as TR Garak ak Mud existed at all. In any event it cannot be denied by the defendants that in the face of the clear provisions of the memorandum of charge and exhs RC-8 and RC-9, the defendants through HLE clearly intended to defraud the plaintiff as their

creditor by channelling $1.5m to other purpose than the payment to the plaintiffs as the main contractors. If such action is not intended to defraud the creditors I do not know what is.

If the application for timber licence by the Bumiputra third party had been successful and HLE were to act as contractor as claimed by it, I did not see the logic for HLE to pay $1.5m to the said Bumiputra third party merely as a contractor. In fact the position should be the reverse! The whole exercise would seem to be tainted with illegality and the defendants by inveigling HLE so to act, had knowingly been parties to fraudulent trading.

On the facts, the plaintiffs succeeded to show the intent to defraud the creditors by HLE through the defendants as responsible officers of HLE.

(3) *Statement of accounts of HLE*

The statement of accounts for the years ending 31 December 1981, 1982, 1983, 1984, 1985, 1986 and 1987 were produced by the defendants during their examination under Originating Summons No KG 156 of 1988 (see exhs RC-10(1), RC-10(2), RC-10(3), RC-10(4), RC-10(5), RC-10(6) and RC-10(7)). From these accounts it could be seen that HLE has been making heavy losses and incurring heavy expenditure without any viable income. The plaintiffs' counsel submitted that the first defendant was bold enough to admit that under the 'profit and loss account', the item 'payment to sub-contractors' represented the value of work done by 'sub-contractors' on the property when actually no payment was made to the 'sub-contractors'. The plaintiffs took issue on the date the statutory declaration was signed pursuant to s 169(3) of the Companies Act 1965 and the date of the lodgement of the statement of accounts with the Registrar of Companies. The defendants explained that there was a possibility of a mix-up between the draft account and the final account prepared by their accountants and they could have signed both accounts. I was prepared to give the benefit of the doubt to the defendants on this issue. However it did not detract from the fact that in RC-12(A) under the category of 'current assets' there is an item showing 'directors current account' as $1,340,000 which was later merged into the sundry debtors account as shown in RC-10(5). It clearly showed that the directors (the defendants included) were indebted to HLE thereby breaching s 133 of the Companies Act 1965 (see *Re Peace Insurance Co Ltd*[2]). It would appear according to the plaintiffs that the defendants doctored the accounts by trying 'to pull wool over the eyes of the plaintiffs' thereby practising fraud against the plaintiffs by suppressing the very pertinent fact that the directors (the defendants included) were indebted to HLE. The plaintiffs brought to the attention of the court that the account of $1.5m advanced to one TR Garak ak Mud was absent from both sets of account. It was manifestly clear to me that the defendants unjustly enriched themselves thereby establishing their intent to defraud the creditors of HLE in general and the plaintiffs in particular and the fraudulent purposes to which they have been carrying on HLE's business. It was my view that the plaintiffs succeeded on this ground.

(4) *The disposal of HLE's main asset*

The arbitration award was published on 20 May 1988 and *five days later*, ie on 25 May 1988, HLE transferred its main asset, the property, to Tolaz Sdn Bhd and on the very next day, the memorandum of transfer was registered (see exhs RC-3 and RC-4). Tolaz Sdn Bhd was incorporated on 14 January 1988 with a paid capital of a mere $2 and an authorized capital of $25,000 (see RC-5). One of the directors was Yeh Hsin-Tsan, one of the purchasers of HLE's shares vide agreement dated 5 April 1984 (see RC-13). The property was sold for $3m.

Even assuming that there was a marked drop in the valuation of the property because of recession, the valuation report ('TLK-5') put the valuation of the property at $3,790,000 and yet the property was sold for $3m to Tolaz Sdn Bhd, a company of doubtful credentials by the defendants. The speed with which the transaction was dealt and the registration of the transfer of the property in such unholy haste coupled with the 'direct' payment to Public Finance Bhd in settlement of the debt of HLE, according to the plaintiffs' counsel, 'all smack of a transaction too pat to be palatable as truth'. It neatly showed the scheme by the defendants in the management of HLE to defraud the plaintiffs as creditor with the sole and fraudulent purpose of putting assets beyond the reach of the plaintiffs. (See *Lloyds Bank Ltd* v *Marcan & Ors*[3] and *Re Mahel Investments Pty Ltd and the Companies Act*.[4]) It was my view that the plaintiffs succeeded on this ground also.

In short, I was satisfied that on the facts, the documents and the actions of the defendants, HLE was carrying on business with intent to defraud the plaintiffs, to the knowledge and, indeed under the direction of the defendants. In the circumstances, the provisions of s 304 of the Companies Act 1965 were satisfied and I made the order in terms of the summons.

Order accordingly.

Solicitors: *CJ Eng Advocates*; *KY Lin & Co Advocates*.

Reported by *Teoh Ai Lin*